Company Act (12 U.S.C. 1843(c)(13)) generally to allow United States banking organizations, with the prior consent of the Board, to acquire and hold investments in foreign companies that do business in the United States subject to the following conditions:

(1) The foreign company is engaged predominantly in business outside the United States or in internationally related activities in the United States;*

(2) The direct or indirect activities of the foreign company in the United States are either banking or closely related to banking; and

(3) The United States banking organization does not own 25 percent or more of the voting stock of, or otherwise control, the foreign company.

In considering whether to grant its consent for such investments, the Board would also review the proposals to ensure that they are consistent with the purposes of the Bank Holding Company Act and the Federal Reserve Act.

[46 FR 8437, Jan. 27, 1981]

§211.603 Commodity swap transactions.

For text of interpretation relating to this subject, see §208.128 of this chapter.

[56 FR 63408, Dec. 4, 1991]

§211.604 Data processing activities.

(a) *Introduction.* As a result of a recent proposal by a bank holding company to engage in data processing activities abroad, the Board has considered the scope of permissible data processing activities under Regulation K (12 CFR part 211). This question has arisen as a result of the fact that §211.5(d)(10) of Regulation K does not specifically indicate the scope of data processing as a permissible activity abroad.

(b) *Scope of data processing activities.* (1) Prior to 1979, the Board authorized specific banking organizations to engage in data processing activities abroad with the expectation that such activity would be primarily related to financial activities. When Regulation K was issued in 1979, data processing was included as a permissible activity abroad. Although the regulation did not provide specific guidance on the scope of this authority, the Board has considered such authority to be coextensive with the authority granted in specific cases prior to the issuance of Regulation K, which relied on the fact that most of the activity would relate to financial data. Regulation K does not address related activities such as the manufacture of hardware or the provision of software or related or incidental services.

(2) In 1979, when the activity was included in Regulation K for the first time, the data processing authority in Regulation K was somewhat broader than that permissible in the United States under Regulation Y (12 CFR part 225) at that time, as the Regulation K authority permitted limited non-financial data processing. In 1979, Regulation Y authorized only financial data processing activities for third parties, with very limited exceptions. By 1997, however, the scope of data processing activities under Regulation Y was expanded such that bank holding companies are permitted to derive up to 30 percent of their data processing revenues from processing data that is not financial, banking, or economic. Moreover, in other respects, the Regulation Y provision is broader than the data processing provision in Regulation K.

(3) In light of the fact that the permissible scope of data processing activities under Regulation Y is now equal to, and in some respects, broader than the activity originally authorized under Regulation K, the Board believes that §211.5(d)(10) should be read to encompass all of the activities permissible under §225.28(b)(14) of Regulation Y. In addition, the limitations of that section would also apply to §211.5(d)(10).

(c) *Applications.* If a U.S. banking organization wishes to engage abroad in data processing or data transmission activities beyond those described in Regulation Y, it must apply for the

*This condition would ordinarily not be met where a foreign company merely maintains a majority of its business in international activities. Each case will be scrutinized to ensure that the activities in the United States do not alter substantially the international orientation of the foreign company's business.

Board's prior consent under §211.5(d)(20) of Regulation K. In addition, if any investor has commenced activities beyond those permitted under §225.28(b)(14) of Regulation Y in reliance on Regulation K, it should consult with staff of the Board to determine whether such activities have been properly authorized under Regulation K.

[Reg. K, 64 FR 58781, Nov. 1, 1999]

§ 211.605 Permissible underwriting activities of foreign banks.

(a) *Introduction.* A number of foreign banks that are subject to the Bank Holding Company Act (''BHC Act'') have participated as co-managers in the underwriting of securities to be distributed in the United States despite the fact that the foreign banks in question do not have authority to engage in underwriting activity in the United States under either the Gramm-Leach-Bliley Act (''GLB Act'') or section 4(c)(8) of the BHC Act (12 U.S.C. 1843(c)(8)). This interpretation clarifies the scope of existing restrictions on underwriting by such foreign banks with respect to securities that are distributed in the United States.

(b) *Underwriting transactions engaged in by foreign banks.* (1) In the transactions in question, a foreign bank typically becomes a member of the underwriting syndicate for securities that are registered and intended to be distributed in the United States. The lead underwriter, usually a registered U.S. broker-dealer not affiliated with the foreign bank, agrees to be responsible for distributing the securities being underwritten. The underwriting obligation is assumed by a foreign office or affiliate of the foreign bank.

(2) The foreign banks have used their U.S. offices or affiliates to act as liaison with the U.S. issuer and the lead underwriter in the United States, to prepare documentation and to provide other services in connection with the underwriting. In some cases, the U.S. offices or affiliates that assisted the foreign bank with the underwriting receive a substantial portion of the revenue generated by the foreign bank's participation in the underwriting. In other cases, the U.S. offices receive ''credit'' from the head office of the foreign bank for their assistance in generating profits arising from the underwriting.

(3) By assuming the underwriting risk and booking the underwriting fees in their foreign offices or affiliates, the foreign banks are able to take advantage of an exemption under U.S. securities laws; a foreign underwriter is not required to register in the United States if the underwriter either does not distribute any of the securities in the United States or distributes them only through a registered broker-dealer.

(c) *Permissible scope of underwriting activities.* (1) A foreign bank that is subject to the BHC Act may engage in underwriting activities in the United States only if it has been authorized under section 4 of the Act. The foreign banks in question have argued that they are not engaged in underwriting activity in the United States because the underwriting activity takes place only outside the United States where the transaction is booked. The foreign banks refer to Regulation K, which defines ''engaged in business'' or ''engaged in activities'' to mean conducting an activity through an office or subsidiary in the United States. Because the underwriting is not booked in a U.S. office or subsidiary, the banks assert that the activity cannot be considered conducted in the United States.

(2) The Board believes that the position taken by the foreign banks is not supported by the Board's regulations or policies. Section 225.124 of the Board's Regulation Y (12 CFR 225.124(d)) states that a foreign bank will not be considered to be engaged in the activity of underwriting in the United States if the shares to be underwritten are distributed outside the United States. In the transactions in question, all of the securities to be underwritten by the foreign banks are distributed in the United States.

(3) Regulation K (12 CFR part 211) was amended in 1985 to provide clarification that a foreign bank may not own or control voting shares of a foreign company that directly underwrites, sells or distributes securities in the United States (emphasis added). 12 CFR 211.23(f)(5)(ii). In proposing this latter provision, the Board clarified